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No. 156

In the Supreme Court of the United States

OCTOBER TERM, 1969

LEE W. TAUFERNER AND CAROLYN E. TAUFERNER,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The district court's findings of fact and conclusions of law (Pet. B–1–B–6) are not officially reported. The opinion of the court of appeals (Pet. A–1–A–7) is reported at 407 F. 2d 243.

JURISDICTION

The judgment of the court of appeals was entered on February 24, 1969. The petition for a writ of certiorari was filed on May 26, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

May petitioner deduct his expenses of commuting between his residence and the plant where he worked, which was located away from any community because of the dangerous nature of its business activities, as ordinary and necessary business expenses pursuant to Section 162(a) of the Internal Revenue Code of 1954?

STATUTES AND REGULATIONS INVOLVED

The relevant portions of Sections 62, 162, and 262 of the Internal Revenue Code of 1954, and of Sections 1.62–1, 1.162–2 and 1.262–1 of the Treasury Regulations on Income Tax (1954 Code), are set forth in the Appendix, *infra,* pp. 7–10.

STATEMENT

Petitioner was employed at a plant where solid fuel rocket engines were tested and manufactured. Because of the danger of the activity, the plant was located in a desert area in Utah 20 miles away from the nearest community. Petitioner was unable to find suitable housing in that community and purchased a residence in Brigham City, Utah, situated 27 miles from the plant. Usually he traveled to and from work by public bus transportation at a fare of 70 cents round trip. At other times, he traveled by car. His employment at the plant was regular and permanent or of indefinite duration. (R. 41–44; Pet. A–2.) [1]

In computing his tax liability for the years 1961 and 1962, petitioner deducted the transportation expenses incurred in travelling between his residence

[1] "R." refers to the record on appeal.

and the plant. The Commissioner of Internal Revenue disallowed the deduction and issued a deficiency notice. Petitioner paid the tax, and his later claims for refund were denied. On his refund action (R. 1–11, 41; Pet. A–1–A–2) the district court held that the expenses in question were deductible either as ordinary and necessary business expenses or as travel expenses (R. 44; see also R. 93, 100–101; Pet. B–6). The court of appeals reversed (Pet. A–7).

ARGUMENT

The decision of the court of appeals is clearly correct. While there is a conflict in result with the Ninth Circuit's decision in *Wright* v. *Hartsell*, 305 F. 2d 221 (Pet. C–1–C–11), that conflict is no longer viable. Neither that conflict nor any other matter warrants review by this Court.

1. It is well established by long-standing Regulations[2] and by many cases,[3] including this Court's de-

[2] See Treasury Regulations 62 (1921 Act), Art. 101(a); Treasury Regulations 65 (1924 Act), Art. 102; Treasury Regulations 69 (1926 Act), Art. 102; Treasury Regulations 74 (1929 ed.), Art. 122; Treasury Regulations 77 (1932 Act), Art. 122; Treasury Regulations 86 (1934 Act), Art. 23(a)–2; Treasury Regulations 94 (1936 Act), Art. 23(a)–2; Treasury Regulations 101 (1938 Act), Art. 23(a)–2; Treasury Regulations 103 (1939 Code), Sec. 19.23(a)–2; Treasury Regulations 111 (1939 Code), Sec. 29.23(a)–2; Treasury Regulations 118 (1939 Code), Sec. 39.23(a)–2(i); Treasury Regulations on Income Tax (1954 Code), Secs. 1.62–1(g), 1.162–2(e) and 1.262–1(b)(5).

[3] *Sullivan* v. *Commissioner*, 1 B.T.A. 93; *Commissioner* v. *Flowers*, 326 U.S. 465; *Steinhort* v. *Commissioner*, 335 F. 2d 496, 503 (C.A. 5) (and the cases there cited); *Heuer* v. *Commissioner*, 283 F. 2d 865 (C.A. 5), affirming *per curiam*, 32 T.C. 947; *Smith* v. *Warren*, 388 F. 2d 671 (C.A. 9); *Sansone* v. *Commis-*

cision in *Commissioner* v. *Flowers*, 326 U.S. 465, that commuting expenses—the expenses a taxpayer incurs in traveling between his residence and his principal place of business—are not deductible either as business transportation or business traveling expenses. See *United States* v. *Cornell*, 389 U.S. 299, 303. Instead, these costs are nondeductible personal expenses within the scope of Section 262 of the Code. This general rule is applicable even to those commuting expenses which are unavoidably incurred, as here, because a taxpayer cannot reasonably live closer to his work than he does. See *Steinhort* v. *Commissioner*, 335 F. 2d 496, 503 (C.A. 5); *Heuer* v. *Commissioner*, 283 F. 2d 865 (C.A. 5), affirming *per curiam*, 32 T.C. 957; cf. *Smith* v. *Warren*, 388 F. 2d 671 (C.A. 9). No exception could reasonably be made, for, as a matter of practical tax administration, there would be no feasible manner in which to determine which taxpayers had mitigated their commuting expenses by living as close to their work as was reasonably possible.[4]

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sioner, 41 T.C. 277, 290–291; *Verner* v. *Commissioner*, 39 T.C. 749, 755, 756 (1963); *Berhov* v. *United States* (D. Nebr.), decided February 26, 1968 (21 A.F.T.R. 2d 782).

[4] For example, it would be practically impossible to determine whether a New York taxpayer, employed in Manhattan, should attempt to locate his family in Manhattan instead of commuting from Westchester County or Long Island. Similar problems would arise for rural areas. For example, in the instant case, Corinne, Utah, located 20 miles from the plant was apparently uninhabitable for petitioner and his family (Pet. B–4) but might or might not be considered habitable for single or childless taxpayers, depending on their *personal* needs, financial and social status, and style of living. Any rule based upon such subjective and personal determinations of whether a given location was reasonably habitable for a particular taxpayer would clearly be unworkable.

2. In *Wright* v. *Hartsell, supra,* the Ninth Circuit held that a taxpayer could deduct the expenses he would have incurred in commuting between a remote Atomic Energy Commission site and the nearest town 46 miles away. This result was predicated on the court's assumption that the travel expense provision, Section 162(a)(2) of the Code, Appendix, *infra,* p. 8, applied to commuters on daily trips. However, this Court, in *United States* v. *Correll,* has since sustained the Commissioner's position that expenses incurred on one-day business trips are not deductible under Section 162(a)(2), but are in the same non-deductible category as commuting expenses. While the *Correll* case involved meal expenses, consistant construction of the "away from home" requirement of Section 162(a)(2) requires the same result for any other expenses claimed under Section 162(a)(2). See *Commissioner* v. *Bagley,* 374 F. 2d 204, 208, n. 11 (C. A. 1), certiorari denied, 389 U.S. 1046. Transportation expenses incurred on one-day business trips are deductible only as business transportation expenses under Section 162(a) (*Commissioner* v. *Bagley, supra,* p. 208) and commuting is not business travel (see, e.g., Secs. 1.62–1(g); 1.162–2(e), and 1.262–1(a)(5) of the Treasury Regulations on Income Tax (1954 Code), Appendix, *infra,* pp. 8–10).[5] The intervention of this Court's decision in *Correll* thus makes it most unlikely that the Ninth Circuit would today follow *Wright* v.

[5] The validity of these long-standing regulatory provisions cannot be seriously disputed. *E.g., Johnson* v. *Bingler,* decided April 23, 1963 (37 U.S. Law Week 4365, 4367–4368); *United States* v. *Correll, supra* at 305–306. See fn. 3, *supra.*

Hartsell, and thereby strips the conflict of any significance. Moreover, in *Smith* v. *Warren*, *supra*, decided a month after this Court's decision in *Correll*, the Ninth Circuit made no mention of *Wright* v. *Hartsell*, and decided to (388 F. 2d, p. 673) "adhere to the principles of decision set out in the *Steinhort* and *Heuer*" decisions, *supra*.

3. There is no conflict between the decision below and this Court's decision in *Commissioner* v. *Flowers*, *supra*. In *Flowers*, this Court reiterated the fundamental point that commuting expenses, by their very nature, lack (326 U.S. at 473) "the necessary direct relation to the prosecution of the business" required for a deductible expense. As this Court there stated, because commuting expenses are motivated or occasioned by (*id* at 474) "the *personal* conveniences and necessities of the traveler" (emphasis supplied), rather than the "exigencies of business", they do not qualify as business travel expenses.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

Internal Revenue Code of 1954:

SEC. 62. ADJUSTED GROSS INCOME DEFINED.

For purposes of this subtitle, the term "adjusted gross income" means, in the case of an individual, gross income minus the following deductions:

(1) *Trade and Business Deductions.*—The deductions allowed by this chapter (other than by part VII of this subchapter) which are attributable to a trade or business carried on by the taxpayer, if such trade or business does not consist of the performance of services by the taxpayer as an employee.

(2) *Trade and Business Deductions of Employees.*—

* * * * *

(B) *Expenses for travel away from home.*—The deductions allowed by part VI (sec. 161 and following) which consist of expenses of travel, meals, and lodging while away from home, paid or incurred by the taxpayer in connection with the performance by him of service as an employee.

(C) *Transportation expenses.*—The deductions allowed by part VI (sec. 161 and following) which consist of expenses of transportation paid or incurred by the taxpayer in connection with the performance by him of services as an employee.

* * * * *

(26 U.S.C. 62.)

SEC. 162. TRADE OR BUSINESS EXPENSES.

(a) *In General.*—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—

* * * * *

(2) traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; * * *

* * * * *

(26 U.S.C. 162.)

SEC. 262. PERSONAL, LIVING, AND FAMILY EXPENSES.

Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses.
(26 U.S.C. 262.)

Treasury Regulations on Income Tax (1954 Code):

Sec. 1.62–1. *Adjusted gross income.*

* * * * *

(g) Transportation expenses paid or incurred by an employee in connection with performance by him of services for his employer are deductible from gross income under part VI in computing adjusted gross income. "Transportation," as used in section 62(2)(C), is a narrower concept than "travel," as used in section 62(2)(B), and does not include meals and lodging. The term "transportation expense" includes only the cost of transporting the employee from one place to another in the course of his employment, while he is not away from home in a travel status. Thus, transportation costs may include cab fares, bus fares, and the like, and also a pro rata share of the employee's expenses of operating his automobile, including gas, oil, and depreciation. All transportation

expenses must be allowable expenses under part VI (section 161 and following), subchapter B, chapter 1 of the Code, as ordinary and necessary expenses incurred during the taxable year in carrying on a trade or business as an employee. Transportation expenses do not include the cost of commuting to and from work: this cost constitutes a personal, living, or family expense and is not deductible. (See section 262.)

* * * * * *

(26 C.F.R., Sec. 1.62–1.)

§ 1.162–2 *Traveling expenses.*

(a) * * * Only such traveling expenses as are reasonable and necessary in the conduct of the taxpayer's business and directly attributable to it may be deducted. If the trip is undertaken for other than business purposes, the travel fares and expenses incident to travel are personal expenses and the meals and lodging are living expenses. * * *

* * * * * *

(e) Commuters' fares are not considered as business expenses and are not deductible.

* * * * * *

(26 C.F.R., Sec. 1.162–2.)

§ 1.262–1 *Personal, living, and family expenses.*

(a) *In general.* In computing taxable income, no deduction shall be allowed, except as otherwise expressly provided in chapter 1 of the Code, for personal, living, and family expenses.

(b) *Examples of personal, living, and family expenses.* Personal, living, and family expenses are illustrated in the following examples:

* * * * * *

(5) Expenses incurred in traveling away from home (which include transportation expenses, meals, and lodging) and any other

transportation expenses are not deductible unless they qualify as expenses deductible under section 162, * * *. The taxpayer's costs of commuting to his place of business or employment are personal expenses and do not quality as deductible expenses. * * *

* * * * *

(26 C.F.R., Sec. 1.262–1.)

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